SERVED: September 2, 1992

NTSB Order No. EA-3658

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. GARY L. COKER, Respondent.	Docket SE-10021

OPINION AND ORDER

Both the Administrator and respondent have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on September 6, 1989.[1] By that decision, the law judge affirmed an order of the Administrator charging respondent with violations of sections 61.3(c) and 91.14(a)(3) of the Federal Aviation

[1]An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR," 14 C.F.R. Parts 61 and 91), but reduced the suspension imposed from 45 to 15 days.[2] Both parties have filed briefs in reply.

The order of suspension, which served as the complaint, alleged as follows:

"1. You hold Airman certificate No. 1798584 with airline transport pilot privileges.

2. On June 16, 1988, you acted as pilot in command of Civil Aircraft N88871, a McDonnell Douglas Model DC-3, on a flight in air commerce, with three (3) persons aboard from Harlingen, Texas to Brownsville, Texas.[3]

3. At the time of the above-mentioned flight, the aircraft had only two seats for the three occupants.

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[2]At the time the incident occurred, FAR sections 61.3(c) and 91.14(a)(3) (now 91.107(b)) read, in pertinent part, as follows:

"§ 61.3 Requirement for certificates, rating, and authorizations.

* * *

(c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter."

"§ 91.14 Use of safety belts and shoulder harnesses.

(a) Unless otherwise authorized by the Administrator --

* * *

(3) During takeoff and landing of U.S. registered civil aircraft ..., each person on board that aircraft must occupy a seat or berth with a safety belt and shoulder harness, if installed, properly secured about him. However, a person who has not reached his second birthday may be held by an adult who is occupying a seat or berth, and a person on board for the purpose of engaging in sport parachuting may use the floor of the aircraft as a seat."

[3]The three persons on board were respondent, his copilot, and respondent's 13-year-old son.

4. At the time of the above-mentioned flight, you did not have in your possession an airman medical certificate."

In his appeal, the Administrator contends that the law judge improperly reduced the sanction. Respondent, however, argues that the law judge erred in refusing to grant his motion to dismiss the Administrator's complaint for failure to meet the six-month notice requirement of Rule 33 of the Board's Rules of Practice (the Stale Complaint Rule).[4] Respondent also disagrees with the law judge's finding of a violation of section 91.14(a)(3). He asserts that the regulation does not explicitly make the pilot-in-command responsible for insuring that each

[4]The Stale Complaint Rule, which appears at 49 C.F.R. § 821.33, provides in pertinent part:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

(3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect of the Administrator's good cause issue allegations."

passenger aboard an aircraft is seated and wearing a safety belt before takeoff and landing.

Regarding the six-month notice requirement, we believe the law judge correctly found that respondent received proper notice within the applicable time period, and that respondent's argument claiming inadequate proof of service must fail.[5] The proof provided was a postal receipt indicating that the Administrator mailed the notice on December 12, 1988, via Express Mail. On the receipt, the box for "Second Day Delivery" was checked. The southwest regional office of the Federal Aviation Administration (FAA) received the returned receipt on December 13, 1988. Also identified on the receipt was the address where the notice was delivered. This address matched the return address on a letter written by respondent to the FAA dated July 8, 1988, and admitted into evidence at the hearing. This is also the same address where the Notice of Hearing was sent via certified mail; the receipt, signed by "Mrs. Gary Coker" and dated August 17, 1989, was returned to the FAA. Based on the foregoing, we believe the law judge properly found there was sufficient proof that respondent received timely notice of the charges against him.

As for the section 91.14(a)(3) violation, we reject respondent's argument that the regulation imposed no duty upon him to see that his passengers were seated and wearing seat belts during takeoff and landing. Since the filing of respondent's

[5]The incident occurred on June 16, 1988, and the mail service was made on or about December 12, 1988, approximately four days before the expiration of the six-month period.

appeal, we have addressed this issue in Administrator v. Fay, NTSB Order No. EA-3316 (1991). In Fay, we upheld an order of the Administrator charging the respondent, as pilot-in-command, with a violation of section 91.14(a)(3) that occurred when he took off without insuring that the parachutists he was carrying were wearing seat belts. We stated: "It was incumbent on respondent, the pilot-in-command, to insure that every passenger was using a seat belt before takeoff." Id. at 11. This standard applies equally to respondent in the instant case.

The law judge affirmed both violations, yet reduced the sanction imposed by the Administrator from 45 days to 15 days. Under Administrator v. Muzquiz, 2 NTSB 1474 (1975), the law judge, after affirming all the alleged violations, must have clear and compelling reasons before reducing the sanction imposed by the Administrator. We find that the law judge in the instant case did not articulate any reason sufficiently compelling to warrant a deviation from the original sanction imposed by the Administrator. As the law judge stated, the section 61.3(c) violation was de minimis,[6] however, a 45-day suspension, as initially imposed by the Administrator, is appropriate for the violation of section 91.14(a)(3) alone. Respondent's decision to allow his son to ride in the aircraft without a seat and seat belt unnecessarily exposed the boy to potential harm. It is

[6]Respondent testified that he had lost his medical certificate and had contacted the FAA to obtain a replacement but had not yet received one. Therefore, although respondent had a valid medical certificate, he did not have it "in his personal possession" as required by the regulation.

inconsequential that the flight was of short duration. The regulation requires that all passengers wear seat belts during takeoff and landing, regardless of the length of the flight. We do not find it a mitigating factor that it would, or might, have been inconvenient for respondent to comply with the FARs.

Based on the aforementioned discussion, we find that safety in air commerce or air transportation and the public interest require the affirmation of the Administrator's order in its entirety.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The appeal of the Administrator is granted;
3. The initial decision is affirmed, except to the extent that it reduces sanction, and
4. The 45-day suspension of respondent's airman certificate shall begin 30 days after service of this order.[7]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[7]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).